United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1218

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1218, 1265, 1266, 1354, 1438

In the Matter of the Complaint
of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS,
Appellant.

69 Civ. 5303

BINGHAM & COMPANY, et al.,
Plaintiffs-Appellants,
against

THOS. & JNO. BROCKLEBANK, LTD.,
Defendant-Appellee.

70 Civ. 290

KELLER INDUSTRIES INC.,
Plaintiff-Appellant,
against

THOS. & JNO. BROCKLEBANK, LTD.,
Defendant-Appellee.

69 Civ. 4644

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE THOS. & JNO. BROCKLEBANK LTD.

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE, THOS. & JNO. BROCKLEBANK LTD.

AS CHARTERER OF THE MS NICOLAOS S. EMBIRICOS

Statement of the Issues Presented For Review

1. The District Court correctly found that the proximate cause of the stranding of the Vessel was the negligence of the Master in the navigation of the Vessel and that Bigham & Company, et al., Plaintiffs-Appellants and Keller Industries, Inc., Plaintiff-Appellant (hereinafter collectively referred to as "Cargo") failed to meet the burden of establishing either unseaworthiness, or if there was unseaworthiness, a causal connection between unseaworthiness and the stranding. The District Court therefore correctly concluded that Compania Naviera Epsilon, S. A., Appellant-Appellee ("Shipowner") and Thos. & Jno. Brocklebank Ltd.* ("Charterer") were not liable to Cargo in view of the provisions of the Carriage of Goods By Sea Act (COGSA) 46 U.S.C. § 1304(2)(a).

2. Even if this Court should find that the District Court should have held that the cause of the stranding was the failure of the Shipowner to exercise due diligence to make the Vessel seaworthy and that such unseaworthiness was the proximate cause of the stranding, and that as a result thereof Charterer is liable to Cargo, Charterer is entitled to indemnification in full from Shipowner for Charterer's resulting damages including its liability to Cargo, loss of freight monies, attorneys' fees and costs.

3. The District Court correctly found that Charterer was entitled to collect from Cargo unpaid freight charges

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* Cunard-Brocklebank Ltd., agent of the Charterer, was originally named a defendant but was dropped from the case by stipulation (83a).

in the stipuated amount together with interest in view of the Guaranteed Freight Clause in Charterer's Bills of Lading.

4. Even if the District Court erred in allowing Charterer to recover unpaid freight from Cargo, then in such event Charterer is entitled to collect such unpaid freight from Shipowner.

5. The District Court correctly held that Charterer was entitled to collect from Shipowner its attorneys' fees and legal costs in view of the contractual relationship between Shipowner and Charterer and relevant principles of indemnity, as well as in the proper exercise of its discretion.

Statement of the Case and Facts

Charterer adopts the Statement of the Case and Facts in the brief of Shipowner except that Charterer rejects the footnote to said Statement set forth on page 3 of said brief. Such further facts as are relevant are set forth below at the appropriate places in the main body of the argument.

POINT I

The District Court correctly found that the proximate cause of the stranding was the negligence of the Master in the navigation of the vessel and that Cargo failed to meet the burden of establishing unseaworthiness and that therefore both Shipowner and Charterer were relieved of liability to cargo in view of the provisions of COGSA, 46 U.S.C. § 1304(2)(a).

For the reasons more fully set forth below in Point II of our brief, the main burden of defending against Cargo's claim falls upon the Shipowner since Shipowner has conceded that if Cargo should prevail, Charterer is entitled to

judgment on its contingent claim against Shipowner for whatever liability Charterer thereby incurs to Cargo (SM page 278a; Shipowner's Trial Memorandum p. 19). Since Shipowner will discuss fully in its brief the main issue in this case, namely, Cargo's claim against Shipowner and Charterer, we will deal only briefly with this issue.

All parties agree that Cargo's claim is governed by the United States Carriage of Goods By Sea Act (COGSA) 46 U.S.C. § 1300 ff. Thus, if the cause of the loss was negligent navigation, a defense under 46 U.S.C. § 1304(2)(a), as Owner and Charterer contend, and as the District Court so found, there is no liability to Cargo by either Shipowner or Charterer. In order to recover in such a case Cargo must establish not only unseaworthiness but also that such unseaworthiness was the proximate cause of the stranding. Even then, there is no liability if it is shown that the Shipowner exercised due diligence to make the Vessel seaworthy.

The District Court found that the Shipowner met the burden of proving that the cause of the stranding was negligent navigation and that Cargo failed to establish either unseaworthiness, or if there was unseaworthiness, a causal connection between such unseaworthiness and the stranding and therefore dismissed Cargo's claims.

The basis of the District Court's findings of negligent navigation and the absence of unseaworthiness can be briefly summarized. The Vessel sailed from Colombo, Ceylon on May 13, 1969 bound for American ports. The Master projected a course through the One and Half Degree Channel of the Maldive Islands in the Indian Ocean and plotted a course line of 228° true on the ship's chart. At noon on the same day, May 13th, the Master determined the Vessel's position by celestial aids and on this basis altered course to 230° true. However, he failed to plot the new course projection of 230° on the ship's chart.

The following day, May 14th, the Master determined a new position. Having failed to plot the 230° course line on the chart, he forgot that the course had been changed to 230°. Consequently, he compared his new position on May 14th with the original course line of 228° and discovering his new position to be north of the course line of 228°, he erroneously concluded that the Vessel was being driven to the north. If he had plotted the 230° course line on the chart, the course which he was in fact steering, he would have discovered that his new position was south of that line. In other words, he would have discovered that he was being driven to the south when he erroneously concluded he was being driven to the north. The course changes which the Master thereafter made as he approached the One and Half Degree Channel were thus based on the erroneous assumption that he was being driven to the north whereas in fact he was being driven to the south. As a result, shortly thereafter in the early morning hours of May 15, 1969, the Vessel stranded on Suvadiva Atoll at the entrance to the One and Half Degree Channel in the Maldive Islands resulting in the loss and damage to Cargo which is the subject of this litigation.

Shipowner and Charterer urged and the District Court found as a fact that the above mentioned navigational error of the Master was the proximate cause of the stranding (89a).

Cargo argued that the Vessel was unseaworthy in four specific respects:

(1) That the Vessel's navigational aids, i.e., charts and books, were out of date and failed to supply necessary relevant information regarding the direction and strength of the currents in the area.

(2) That the Vessel's radar was improperly maintained and known to be unreliable.

(3) That the Master was incompetent and Shipowner should have known this.

(4) That the Vessel was improperly manned and that the Second Mate, Alexopoulos, was not a duly licensed officer and served in violation of Greek Crew requirements.

The evidence consisted of hundreds of pages of testimony by seven witnesses in open court and by deposition of seven other witnesses accompanied by numerous exhibits. As is evident from the opinion of the District Court, this material was reviewed and analyzed in depth with the result that the District Court found as a fact that the proof failed to establish any of Cargo's contentions set forth above (see 88a-106a).

The District Court, having found as a fact that the navigational error of the Master was the proximate cause of the stranding and that Cargo failed to establish any of the specific conditions of unseaworthiness charged, correctly dismissed Cargo's claim in view of 46 U.S.C. § 1304 (2)(a).

Unless this Court determines that the findings of the District Court with respect to negligent navigation and unseaworthiness were clearly erroneous, and we submit it is obvious they were not, the decision of the District Court should be affirmed. Fed. R. Civ. P. 52; *The Quarrington Court*, 122 F. 2d 266, 267 (2d Cir. 1941).

POINT II

Even if this Court should hold that the loss was caused by the failure of Shipowner to exercise due diligence to make the Vessel seaworthy before commencement of the voyage and as a result thereof Shipowner and Charterer are liable to Cargo, Charterer is entitled to full indemnity from Shipowner for Charterer's resulting damages, including its liability to Cargo, loss of freight, attorneys' fees and costs.

Under the date of March 26, 1969, Shipowner chartered the Vessel to Charterer for a trip to the United States, Vessel to be delivered to Charterer at Colombo/Chittagong range. The Vessel was delivered to Charterer on April 14, 1969 at Calcutta, the first port of loading, and sailed for the United States on her ill-fated voyage from Colombo on May 13, 1969. The Charter (the "Charter") was on the standard Time Charter Government Form, approved by the New York Produce Exchange. (Charterer's Exhibit 1, 289a-291a).

It is elementary maritime law that a warranty by the owner of a vessel of its seaworthiness is implied by law in every charter. In *G. Gilmore and C. Black, The Law of Admiralty* (1957), (hereinafter "Gilmore and Black"), it is stated at page 182:

> "The general maritime law . . . read into every charter a warranty of seaworthiness of the vessel, equivalent to the warranty of seaworthiness read into the contract of carriage entered into by the 'general' ship".

The same authors discuss the standard New York Produce Exchange Time Charter, revised 1946, which is the one involved in this case. They state as follows at page

204 with respect to such a charter:

> "Most important, it is to be noted that the warranty of seaworthiness, implied by law in every charter, is not only not abolished but is reinforced by the word 'good' in the description of the vessel, and by the provision that she is to be 'tight, staunch, strong, and in every way fitted for the service'. It is further agreed, in Clause 1, that the owners will keep the vessel fit throughout the charter term".

As those authors indicate, this Charter contains express warranties of seaworthiness. Thus, it is stated, among other things, that the "good" Vessel is furnished "with hull, machinery and equipment in a thoroughly efficient state* and classed +100 A.1 at Lloyds Register". The Shipowner further undertakes that the Vessel on delivery is to be "tight, staunch, strong and in every way fitted for ordinary cargo service . . . and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage" and that the Shipowner will "maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service" under the Charter.

As previously stated, the basic position of Charterer, which is the same as that of Shipowner, is that the sole cause of the stranding and cargo loss was negligent navigation. The District Court so found and therefore correctly held that Cargo's claim fails both as against Charterer and Shipowner (46 U.S.C. § 1304(2)(a)). If this Court should hold that the District Court was in error in its findings and conclude that the cause of the stranding was unseaworthiness and that Shipowner failed to exercise due diligence to make the Vessel seaworthy prior to the commencement of the voyage, then Cargo would recover from both Shipowner and Charterer.

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* This phrase appears twice.

A. If the Court Should Hold Shipowner and Charterer Liable to Cargo, Charterer is Entitled to Indemnity From Shipowner.

It is apparent that any finding of unseaworthiness and failure of Shipowner to exercise due diligence to make the Vessel seaworthy resulting in recovery by Cargo against Charterer *ipso facto* constitutes a breach by Shipowner of its Charter warranty of seaworthiness thereby giving Charterer a cause of action against Shipowner for indemnity against any losses sustained by Charterer as a result of such breach of warranty.

One of such items would be Charterer's liability to Cargo. Another item would be Charterer's loss of freight money. If the Court holds that Charterer's claim for freight money under the provision of the covering Bills of Lading (Charterer's Exhibit 4, 299a) providing for payment of freight, "vessel and/or goods lost or not lost . . .", is unenforceable because the carrier itself is liable to Cargo, then it is apparent that such loss was brought about solely by Shipowner's breach of its warranty. Such loss of freight is, therefore, a proper element of Charterer's indemnity claim against Shipowner.

Charterer would also be entitled to its attorneys' fees and costs necessarily incurred in the litigation resulting from Shipowner's breach of warranty. Recent decisions in this Circuit have made it clear that in an admiralty action, when there is an indemnity relationship and one party is sued by a third party for a breach for which such party is entitled to indemnity, he may recover his attorneys' fees from the other party who is obligated to indemnify him.

In *United States* v. *S.S. Wabash,* 331 F. Supp. 145 (S.D.N.Y. 1971), cargo sued the vessel for damage to cargo caused by a leak in a valve in the hold of the vessel. After cargo's claim had been settled, the dispute as to liability

for the loss between the vessel owner and the charterer remained. The Court found the vessel owner had breached its implied warranty of seaworthiness and was, therefore, liable. It then granted attorneys' fees to the charterer, basing its award on "the precedents of this court and the Second Circuit". 331 F. Supp. at 148.

That case was cited with approval by this Court in an opinion by Judge Friendly in *Nichimen Co.* v. *M.V. Farland,* 462 F. 2d 319 (2d Cir. 1972). There the charterer was required to reimburse the vessel owner for attorneys' fees for breach of the charter party agreement and causing damage to the cargo. Judge Friendly stated if the charterer was in breach of its duty to the owner under the charter by not properly stowing the cargo it was

> "bound to make good the expectable consequences of its breach, of which the incurring of attorneys' fees in defending against a claim . . . [by the cargo owner] was surely one". 462 F. 2d at 333.

Therefore, even if Charterer is liable to Cargo, Charterer is entitled to indemnification from Shipowner for Charterer's resulting damages, including its liability to Cargo, loss of freight money, attorneys' fees and costs.

B. Shipowner Is Not Entitled to Limitation of Liability With Respect to Any Claim By Charterer Against Shipowner For Breach of Charter.

Even if this Court should hold that the cause of the stranding was unseaworthiness entitling Cargo to recover from Charterer and Shipowner, but further hold that Shipowner is entitled to limitation of liability pursuant to the provisions of 46 U.S.C. § 183, nevertheless, any such limitation right is not available to Shipowner with respect to Charterer's claim for indemnity.

It has been established for many years that even though a loss is incurred without the "privity or knowledge" of

the shipowner (46 U.S.C. § 183) nevertheless limitation will not be allowed if the shipowner's liability is based upon a "personal contract". It is settled that "a charter party is the clearest example of what is, under current case law, held to be a 'personal contract' ". *Gilmore and Black,* 707. This rule has been firmly established by several cases in the Supreme Court commencing with *Pendleton* v. *Benner Lines,* 246 U.S. 353 (1918) and was restated when the same issue arose again in *Luckenbach* v. *McCahan Sugar Co.,* 248 U.S. 139 (1918). To the same effect is *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U.S. 334 (1919).

It is, therefore, settled that any claim asserted in this proceeding by Charterer against Shipowner which is based upon a breach by Shipowner of the Charter (289a-299a) is not subject to limitation since the Charter is the personal contract of Shipowner. This is so even if the cause of the disaster resulted without the fault or privity of the Shipowner and the Shipowner is otherwise entitled to limitation as against Cargo.

We understand from counsel for Shipowner that they do not dispute the foregoing, namely, that whatever right to limitation Shipowner might have as against Cargo, Shipowner in no event has any such right to limitation as against Charterer in view of the fact that the Charter is the personal contract of Shipowner. Furthermore, counsel for Shipowner acknowledged this in open court at the conclusion of the trial (SM 278A).

POINT III

The District Court's determination that Charterer is entitled to recover $156,088.88 unpaid freight and interest from the respective Cargo interests should be affirmed.

A. Guaranteed Freight Clauses Have Uniformly Been Held Valid and Enforceable.

Although the general rule is that freight is not deemed earned unless the cargo is delivered, it is settled that this rule may be altered by contract between the carrier and the shipper. In *Alcoa S.S. Co.* v. *United States*, 338 U.S. 421 (1949), the Court said at page 422:

> "But contractual provisions establishing the shipper's liability for freight regardless of actual delivery have been uniformly held valid, and have become common stipulations in carrier's bills of lading."

The "Guaranteed Freight Clause" contained in all of the bills of lading issued by Charterer (SM p. 27; 299a; Charterer's Exhibit 4) is just such a provision. The relevant portion of the clause reads as follows:

> "Freight on the goods shall be deemed earned on shipment, and shall be payable vessel and or goods lost or not lost. . . . [I]f the vessel or the goods are lost or do not arrive at such port [port of discharge], freight shall be paid to the Carrier without further demand by him within 30 days of the date when delivery would in the ordinary course have been made".

Whether Charterer is entitled to recover the unpaid freight money from Cargo is hardly a novel question. On the contrary, the validity and enforceability of such a clause has been upheld in a wide variety of situations

over a period of many years in decisions by the Supreme Court of the United States, the Court of Appeals for this Circuit and other courts.

The subject first received authoritative judicial consideration in three cases which came before the Supreme Court in 1918. *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U.S. 377 (1919); *International Paper Co.* v. *The Gracie D. Chambers*, 248 U.S. 387 (1919); *Standard Varnish Workers* v. *The "Bris"*, 248 U.S. 392 (1919). In these cases the Court enforced guaranteed freight clauses where voyages had been frustrated by embargoes declared by the United States Government. In the first of these, *Allanwilde Transport Co.* v. *Vacuum Oil Company, supra*, a vessel departed New York for Europe loaded with drums of oil. The ship was severely damaged by a storm and forced to return to New York. The ship was repaired and attempted to resume her voyage, but in the meantime an embargo was announced prohibiting ships from sailing to Europe. In holding that the guaranteed freight clause entitled the shipowner to retain the prepaid and guaranteed freight even though the cargo had not been delivered, the Court stated at page 385:

> "The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that 'freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost.' And it is provided that this provision is, with other provisions, 'to be embodied' in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and

carrier. Let us repeat: the explicit declaration is—'Freight to be prepaid net on signing bills of lading. . . . Freight earned, retained and irrevocable, vessel lost or not lost.' The provision was not idle or accidental It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the non-carriage of the cargo. But there are opposing considerations. There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation."

The above cases stand as clear expressions of judicial deference to the contracting parties' intent as expressed in the bills of lading.

Further cases upholding guaranteed freight clauses under various circumstances, include: *Hirsch Lumber Co.* v. *Weyerhaeuser Steamship Co.,* 233 F.2d 791 (2d Cir. 1956), *cert. denied,* 352 U.S. 880 (1956) (carrier prevented from unloading by longshoremen's strike); *New Orleans & South American Steamship Co.* v. *W. R. Grace & Co.,* 26 F.2d 967 (2d Cir. 1928) *cert. denied,* 278 U.S. 636 (1928) (fire); *National Steam Navigation Co. of Greece* v. *International Paper Co.,* 241 F. 861 (2d Cir. 1917) (fire); *Pope & Talbot* v. *Blanchard Lumber Co. of Seattle,* 159 F.2d 134 (9th Cir. 1947) (delayed by torpedoing of ship); *Mitsubishi Shoji Kaisha Ltd.* v. *Society Purfina Maritime,* 133 F.2d 552 (9th Cir. 1942), *cert. denied,* 318 U.S. 781 (1943) (takeover of ship by Government of Registry); *United States* v. *American Trading Co. of San Francisco,* 138 F.Supp. 536 (N.D. Cal. 1956) (shipowner ordered to unload cargo by shipper).

The leading case of *The Malcolm Baxter, Jr,* 277 U.S. 323 (1928), is particularly significant. Although the Supreme Court found that the shipowner had failed to exer-

cise due diligence to make the vessel seaworthy and was therefore held liable in damages for cargo's loss directly resulting from such unseaworthiness, nevertheless, it held that the shipowner was entitled to rely upon the Guaranteed Freight Clause of the Bill of Lading and, reversing the lower court, held that the shipowner was entitled to retain the full prepaid freight.

The Court of Appeals for this Circuit in a case involving owner's failure to exercise due diligence to make the Vessel seaworthy and a subsequent fire reached the same conclusion in *The Globe & Rutgers Fire Insurance Co.* v. *United States,* 105 F.2d 160 (2d Cir. 1939). The Vessel sailed from Norfolk on October 1, 1920 with a cargo of coal bound for Buenos Aires. She developed a number of mechanical difficulties enroute and put into Trinidad for repairs. While there and on October 18th, a fire broke out which was finally put out by beaching the Vessel and flooding her holds. Suit was brought by the cargo interests to recover for cargo damage and for a return of prepaid freight. The Bill of Lading contained a Guaranteed Freight Clause. The owner asserted a cross-claim for general average expenses. The lower court allowed recovery by cargo of a pro rata portion of the prepaid freight but denied recovery for damage to cargo in view of the defense of the Fire Statute (46 U.S.C. § 182) The lower court also dismissed the shipowner's claim for general average expenses on the ground that the shipowner had not exercised due diligence to make the Vessel seaworthy. The Court of Appeals reversed the District Court with respect to the prepaid freight claim and held that cargo was not entitled to recover any part of the prepaid freight. After discussing *Standard Varnish, Allanwilde Transport* and *International Paper,* the 1918 Supreme Court cases referred to above, sustaining similar Guaranteed Freight Clauses, the Court of Appeals for this Circuit stated as follows at

page 167:

> "It has also been held that even in the case of an involuntary deviation or a breach of warranty of seaworthiness the shipowner may rely upon the clauses of the contract to retain prepaid freight. *The Malcolm Baxter, Jr.*, 227 U.S. 323, 48 S.Ct. 516, 72 L.Ed. 901.
>
> "We think that the foregoing decisions show how strictly and literally prepaid freight clauses have been construed by the Supreme Court."

In view of the decisions of both the Supreme Court and the Court of Appeals for this Circuit regarding the Guaranteed Freight Clause, we submit it is settled that where the loss results from a cause for which the carrier is not liable, such as negligent navigation, the Guaranteed Freight Clause is clearly enforceable.

The rule is well stated in H. Longley, *Common Carriage of Cargo* § 20.03 at 233 (1967):

> "When this or similar provision [a guaranteed freight clause] is in the contract of carriage, if the cargo is lost during the voyage or if the voyage is necessarily abandoned, *from a cause for which the carrier is not liable*, it is entitled to retain prepaid freight, and if the freight has not been prepaid, the carrier is entitled to collect the freight which would be collected if the delivery had been made . . . ." [Emphasis supplied].

B. Cases Involving the Enforceability of the Guaranteed Freight Clause Where the Loss Resulted From a Fire Provide a Close Analogy to Cases Involving a Loss Resulting From Negligent Navigation.

Situations involving the enforceability of the Guaranteed Freight Clause where cargo was lost as a result of a fire provide a close analogy to a case where cargo was lost as

a result of negligent navigation. This is so because under COGSA, 46 U.S.C. § 1304(2)(a), the carrier is not liable for negligence of its servants in the navigation of the Vessel; under the Fire Statute, 46 U.S.C. § 182, the carrier is not liable for the negligence of its employees—only for the personal "design or neglect" of the owner himself.

In *Globe & Rutgers,* just discussed, the ultimate cause of the cargo loss was fire. The Court held that in view of the Fire Statute, there was no liability for cargo damage and further held that the owner was entitled to freight money under the Guaranteed Freight Clause.*

Under the Fire Statute, as above stated, the owner is exonerated from all liability even if the cause of the fire is the negligence of its own servants provided only the fire did not result from the "design or neglect" of the owner. *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249 (1943); *Earle & Stoddart* v. *Ellerman's Wilson Line,* 287 U.S. 420 (1932); *Albina Engine & Machine Works* v. *Hershey Chocolate Corp.,* 295 F.2d 619 (9th Cir. 1961). As in the case of the fire statute where negligence of an employee is not chargeable to the owner, so negligent navigation of an employee is not chargeable to the carrier under COGSA, 46 U.S.C. § 1304 (2)(a). Since the Guaranteed Freight Clause is enforceable in case of a loss by fire, even though fault of an employee may exist, there is surely no basis for not enforcing such a clause in a negligent navigation situation. In both such cases, no liability to cargo is involved.

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* Counsel for Keller Industries Inc. ("Keller") on page 8 of his brief in discussing the *Globe & Rutgers* case states "the fire and its consequences was considered as having been caused by an accident, and not by negligence." There is no basis whatsoever for such statement. On the contrary, what the court did hold was "that the owner was not subject to liability for the reason that the fire was not caused by its *design or neglect*" (emphasis supplied) 105 F.2d 160 at page 166. As is well known, under the fire statute, negligence is not a basis for liability to cargo unless it is the actual personal "design or neglect" of the owner himself.

The same situation occurred in *National Steam Navigation Co. of Greece* v. *International Paper Company,* 241 F. 861 (2d Cir. 1917). Both ship and cargo were lost as a result of fire. The Bill of Lading contained a Guaranteed Freight Clause which the Court enforced. The Court went even further in this case as it apparently did not even consider it relevant to the issue of enforceability of the freight clause whether the owner was liable to cargo for the loss. See also *New Orleans & South American S.S. Co.* v. *W. R. Grace & Co.*, 26 F.2d 967 (2d Cir. 1928), *cert. denied* 278 U.S. 636 (1928).

C. The Guaranteed Freight Clause Has Been Held Enforceable in a Negligent Navigation Situation.

In addition to the very strong position taken by the Supreme Court, as well as this Court, in enforcing guaranteed freight clauses in a variety of situations, there is a recent case squarely in point in a negligent navigation situation.

In Re Pacific Far East Line, Inc., 314 F. Supp. 1339 (N.D. Cal. 1970), aff'd, 472 F.2d 1382 (9th Cir. 1973) involved a collision between the tanker Esso SEATTLE and the dry cargo vessel GUAM BEAR, owned by Pacific Far East Line (PFE) just outside the entrance to Apra Harbor in Guam resulting in the sinking of the GUAM BEAR. The court found that the collision resulted from the negligence of both vessels. The court held that the cargo on the GUAM BEAR, which was lost and/or damaged, was entitled to collect from the tanker, but not against the carrying vessel, the GUAM BEAR, stating at page 1350:

> "By virtue of the contracts of carriage and the provisions of 46 U.S.C. § 1304(2)(a) [the negligent navigation exemption] PFE is exonerated from liability to these plaintiffs-claimants."

The bills of lading contained a guaranted freight clause which the court held enforceable, stating at page 1348 as

follows:

> "Paragraph 15 of said bills of lading (the 'Freight-Earned' clause) entitles PFE to collect and retain all freight chargeable according to the applicable tariff, and no portion of said freight is returnable to the shippers of non-Government cargoes, either directly or as a credit against cargo's share of the salvage and special charges payable as aforesaid. Mitsubishi Shoji Kaisha, Limited v. Societe Purfina Maritime, 133 F.2d 552 (9th Cir., 1942), cert. denied 318 U.S. 781, 63 S.Ct. 858, 87 L.Ed. 1148 (1943)."

In short, *Pacific Far East* involved a situation identical to ours, namely where the cause of the cargo loss was a "fault" on the part of the carrier, at least in the sense of negligence in the navigation or management of the vessel. This, of course, constituted a defense under COGSA to Cargo's claim for damage, and the Guaranteed Freight Clause was enforced.

Although many cases involving the Guaranteed Freight Clause have come before the courts over the past fifty-six years, including a number in the Supreme Court, and including one in the Ninth Circuit involving negligent navigation, we are not aware of a single case in which the carrier has been exonerated from liability to cargo and yet held not entitled to collect unpaid freight under a Guaranteed Freight Clause.

D. Cases Where the Guaranteed Freight Clause Has Been Held Unenforceable and Comments on Brief of Counsel for Keller.

In the very few cases in which the Guaranteed Freight Clause has been held unenforceable, the basis for such a denial of recovery has generally been not simply liability of the carrier to cargo, but such a serious misconduct "as to amount to a departure from the whole course of the

contract'' thus constituting a ''deviation'' in which case all bill of lading clauses are ousted.

The Willdomino, 272 U.S. 718 (1927), a leading case on the subject of deviation, illustrates the effect of deviation upon a Guaranteed Freight Clause. The Court found that the shipowner was guilty of deviation and as a result held that the Bill of Lading clauses were displaced and, therefore, disallowed recovery under the Guaranteed Freight Clause. Similarly, in *The Louise,* 58 F.Supp. 445 (D. Md. 1945), the Court having found the owner guilty of a voluntary deviation, refused to permit the shipowner to retain his prepaid freight in spite of the Guaranteed Freight Clause.

Iligan International Corp. v. *S.S. John Weyerhaeuser,* 372 F. Supp. 859 (SDNY 1974) decided in the Southern District only last March, is a recent illustration of the practical interpretation given the Guaranteed Freight Clause by the courts, stating at page 869:

> ''Plaintiff has made a claim for the return of the prepaid freight. The cases hold that such prepaid freight is to be returned only if there has been a deviation from the voyage which goes to the essence of the contract. The Louise, *supra;* The Waalhaven, *supra.* Since the Court had determined that here there was no such deviation, the prepaid freight shall not be returned.''

In our case, whether the cause of the stranding was negligent navigation or unseaworthiness, in no event could it be deemed a deviation. In fact, our case bears no resemblance to any of those few cases which have declined to enforce a Guaranteed Freight Clause.

The case of *Mediterranean Agencies* v. *Rethymnis & Kulukundis,* 185 F. Supp. 34 (S.D.N.Y., 1960), referred to on page 5 of the brief on behalf of Keller, does no more

than establish that the Guaranteed Freight Clause is unenforceable in the event the loss is caused by unseaworthiness or deviation. It does not deal with the matter of negligent navigation. On the contrary, the court pointed out that if the cause of the loss was a peril of the sea (which under COGSA is in precisely the same category as negligent navigation (46 U.S.C. 1304(2)(a), 1304(2)(c)) the clause would be enforceable.

As above stated, counsel for Keller in his discussion of *The Globe & Rutgers* case, 105 F.2d 160 (2d Cir. 1939), states at page 10 of his brief that the court found the fire in question ". . . was not due to the fault or negligence or unseaworthiness of the vessel or of the carrier but to the accidental fire. . . ." This is simply not so. On the contrary, all that this Court found was "that the owner was not subject to liability for the reason that the fire was not caused by its design or neglect". 105 F.2d at 166. In short, in view of the settled construction of the fire statute there may have been ample evidence of negligence of the owner's employees but so long as there was not "design or neglect" of the owner himself, the owner would still be exonerated and thus the Guaranteed Freight Clause enforced, as it was.

We do not quarrel with *Firestone International Co.* v. *Isthmian Lines, Inc.*, 1964 A.M.C. 1284 (S.D.N.Y., 1964), a case not officially reported. There the shipowner was held liable to cargo when a metal plate was damaged while being discharged as a result of negligence of a longshoreman. Since the shipowner was held liable to cargo, it has no bearing on the present case.

Counsel for Keller refers to various authorities in support of his contention that contractual exemptions are not construed to include negligence in the absence of an express stipulation to that effect. Whatever merit there may be in such a contention in situations where such negligence would otherwise give rise to liability, such contention is

wholly inapplicable where, as here, public policy as set forth by statute itself expressly exonerates the party from such negligence, i.e., negligent navigation.

E. Pre-Judgment Interest.

Counsel for Keller contends that the District Court should have awarded pre-judgment interest at 5% rather than at the rate of 7½% and 6% on Charterer's judgment for freight money.

We submit the District Court was entirely justified in exercising its discretion in awarding interest at the rates prescribed by New York law. 28 U.S.C. § 1961 provides for the payment of interest on a money judgment in a civil case in a District Court at the rate allowed by State law. Under New York law, the legal rate of pre-judgment interest from June 20, 1969, the date the unpaid bills of lading became due, to August 31, 1972 was 7½%: CPLR § 5004 (McKinney 1963); General Obligations Law § 5-501 (McKinney's 1969 Supp.) and as set by General Regulations of the Banking Board § 4.1, issued pursuant to Banking Law § 14a(2). *Bache & Co., Inc.* v. *International Controls Corp.*, 339 F. Supp. 341, 355-356 (S.D.N.Y. 1972), aff'd, 469 F.2d 696 (2d Cir. 1972). From September 1, 1972 to date, the applicable rate under CPLR § 5004 (McKinney 1963), as amended (Supp. 1973), is 6%.

The provision in the bill of lading to which counsel for Keller refers providing for 5% interest on freight and charges remaining unpaid after the due date was clearly intended to apply to reasonably temporary short-term delays in payment. We submit it was not intended to, and should not be construed to, supersede the statutory rate where cargo refused to pay at all. Cargo should not be permitted to shield itself by the language of the very same clause which it has contended for five years is unenforceable. The District Court sitting in Admiralty has discretionary power with regard to pre-judgment interest and it

is submitted such discretion was appropriately exercised in this case. *Iligan International Corp.* v. *S.S. John Weyerhaeuser,* 372 F. Supp. 859, 869 (S.D.N.Y. 1974); *The Petition of the City of New York,* 332 F.2d 1006 (2d Cir. 1964); *The Wright,* 109 F.2d 699 (2d Cir. 1940).

To summarize, the District Court's holding that Charterer is entitled to recover freight money from cargo together with interest as provided in the judgment entered herein should be affirmed in view of the guaranteed freight clause and the District Court's finding that the cause of the disaster was negligent navigation for which there is no liability to Cargo by either Shipowner or Charterer.

POINT IV

If this Court should hold Charterer is not entitled to recover freight from Cargo even though Charterer is under no liability to Cargo, then in such event Charterer is entitled to recover such freight from Shipowner.

As previously indicated, we submit Charterer is clearly entitled to collect the unpaid freight from Cargo if this Court should affirm the finding of the District Court that the cause of the disaster was negligent navigation. If, nevertheless, this Court should hold otherwise, we submit that in such event Charterer is entitled to recover such unpaid freight from Shipowner.

By statute, 46 U.S.C. § 1304(2)(a), neither Shipowner nor Charterer is liable to Cargo if the cause of the disaster was negligent navigation. This provision of COGSA, although applicable to the relationship between Cargo and Carrier, is inapplicable to charters and the relationship between Shipowner and Charterer. 46 U.S.C. § 1305 provides:

> "The provisions of this chapter shall not be applicable to charter parties . . . ."

The normal rule in contract law that a person is responsible for breach of contract caused by his negligence or that of his servants holds true in maritime law. *Krebs Pigment & Chemical Co.* v. *Sheridan*, 12 F. Supp. 254 (E.D. Pa. 1934), aff'd, 79 F.2d 479 (3d Cir. 1935). It is, therefore, clear that if the stranding was caused by negligent navigation or any act, default or neglect of any employee of Shipowner, this would constitute a breach of contract on the part of Shipowner entitling Charterer to damages, which in our case would consist of lost freight. Only if the Charter itself (Charterer's Exhibit 1, 291a) contained express exculpatory language would there not be such a breach of contract.

We submit that there is no such exculpatory language. On the contrary, by the terms of the Charter, Shipowner expressly assumed responsibility for any such negligent navigation or default of any of its employees. The Charter was not a demise, i.e., the Master and all of the crew remained employees of the Shipowner who assumed full responsibility for them and for the navigation of the Vessel.

In Clause 26 of the Charter, Shipowner expressly assumes responsibility for the Master and crew. Clause 26 provides as follows:

> "Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, acts of Pilots and Tugs insurance, crew, and all other matters, same as when trading for their own account."

Clearly the responsibility for the proper navigation of the Vessel is put squarely on the shoulders of the Shipowner and its employees. Under elementary principles of respondeat superior any negligence on the part of Shipowner's employees gives rise to a cause of action for

damages by Charterer. Under the circumstances described such damages would consist of Charterer's lost freights.

Shipowner contends that one sentence in Clause 16 exonerates it.

Clause 16 reads in its entirety as follows:

> "That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and errors of Navigation, throughout this Charter Party, always mutually excepted.
>
> "The vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vesssels in distress, and to deviate for the purpose of saving life and property."

Shipowner relies on the second sentence of the Clause. It is apparent, however, that this sentence, following as it does immediately after the first sentence, and not even set off as a new paragraph within Clause 16 (as the third sentence is) must be construed only to modify the first sentence dealing with return of charter hire. If it were intended otherwise, it would have been a separately numbered Clause or, at the very least, a new paragraph within Clause 16. It will be noted that the next sentence, which relates to pilotage and deviation and, therefore, has no connection with the two previous sentences, is set off as a separate paragraph within the Clause.

A clause substantially identical to the first two sentences of Clause 16 was discussed in *The Vale Royal,* 51 F. Supp. 412 (D. Md. 1943). Libellants, as owners of the Barge VALE ROYAL, time chartered it to the respondent, Eastern

Transportation, which owned the Tug TROJAN. Due to the negligence of both the barge and the tug, the barge was lost. The Court held that the loss should be divided between the barge owner and the tug owner. Clause 1 of the charter provided, among other things, that

> ". . . Charterers to return the vessel to the Owners in the same seaworthy condition in which it was delivered, less ordinary wear and tear." 51 F. Supp. 421.

Eastern Transportation, as owner of the tug, defended on the ground that it was exonerated from any liability for loss of the barge in view of Clause 9 (which was substantially identical to the first paragraph in our Clause 16) which the Court quoted in full as follows at page 421:

> "9. That should any barge be lost, any hire paid in advance and not earned (reckoning from the date of loss) shall be returned to the Charterers. The Act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers, steam navigation and errors of navigation, throughout this Charter Party always mutually excepted."

The Court held that the provisions of the above quoted Clause 9 did not exonerate the Tug Owner from liability for its negligent navigation or relieve it of its obligation under Clause 1, stating at page 422:

> "We are not disposed to discard a clearly worded, entirely understandable clause, as is paragraph 1, placed at the beginning of the contract , for four lines of ambiguous, antiquated phraseology plucked, presumably, out of an unrelated document and *inserted as the latter part of a subsequent paragraph (paragraph 9) which commences by referring to a specific matter, namely, adjustment of the vessels' hire in the event of loss with which the ambiguous part can consistently*

> *be read.* If parties to contracts, either deliberately or through inadvertence, employ ambiguous language, it is the duty of the court, when called upon to interpret that language, to give, if possible, such effect to it as will not destroy the effect of other clauses clearly phrased and free from any doubt as to their meaning. Admiralty litigation continues to be far too replete with obscurely drawn agreements, such as the one in suit. It is, therefore, appropriate for the admiralty courts to reiterate not merely the hope but the earnest plea that those entering into charter parties or related agreements shall take more care to avoid the charge that, by their written documents, they all too frequently neither mean what they say nor say what they mean." (Emphasis supplied).

The situation is the same in the case at bar. Clause 26 of our Charter as well as the whole tenor of the Charter clearly shows that the Owner was responsible for the navigation of the Vessel and acts of the crew. An ambiguously worded clause, such as Clause 16, should not relieve Owner of its clear obligations set forth in another clause and, in fact, throughout the Charter.

It is significant that the parties gave particular attention to Clause 26. This is shown by the fact that they took the precaution to specifically insert the phrase "acts of Pilots and Tugs". It will be noted this addition to the Clause has been typed on the left in the margin opposite the printed Clause 26. While it is true that we are not directly concerned in this case with "Pilots and Tugs", it certainly does show that the parties focused on this very clause and intended to give it their blessing.

Thus, while Clause 26 is at least partially negotiated and tailor made, Clause 16 remains pure boiler plate on a printed form which anyone can buy for a few cents at the store, or as Judge Coleman said in *The Vale Royal*, "four lines of ambiguous, antiquated phraseology."

The analogous question of whether a demurrage clause is limited by a general exceptions clause has frequently come before the Court and again the general exceptions clause has been held not to prevail over specific potentially inconsistent clauses. In *Yone Suzuki* v. *Central Argentine Ry.*, 27 F.2d 795 (2d Cir. 1928), the charter contained a separately numbered general exceptions clause substantially identical to the second sentence of our Clause 16, and also a separate demurrage clause. There was a strike at the port of discharge and the question arose as to whether the general exceptions clause applied to the running of lay days, and the court held that it did not, stating at page 804:

> "[T]hat exception [the provision with respect to strikes in the general exceptions clause] cannot be regarded as applying to the running of the lay days which, as we have already stated, began by the express agreement of the parties when the Vessel was 'at or off' the Port of Buenos Aires."

In *Continental Grain Co.* v. *Armour Fertilizer Works*, 22 F. Supp. 49 (S.D.N.Y. 1938), the charter contained the conventional general exceptions clause identical to that in the *Yone Suzuki* case above. There was a delay in discharging as a result of a strike and suit was brought for demurrage. The Charterer defended on the strength of the general exceptions clause (Clause 3). The Court rejected this defense stating at page 53:

> "The primary consideration in this case is the applicability of clause 3, the general 'strike exception' clause of the charter party, as a complete and sufficient excuse for respondent's delay and failure to discharge the cargo. The general 'strike exception' clause in the charter party does not prevent the running of demurrage; some similar phrase is necessary in conjunction with the demurrage clause to free the charterer from the burden of paying demurrage when the delay is due to strikes, etc.

> "A review of the cases, wherein the courts have held that charterers were not liable for demurrage for delays due to strikes, reveals that, in addition to the general 'strike exception' clause, the charters also contained stipulations exonerating the charterers from liability for demurrage when the delay was due to strikes, riots, etc., said stipulations being incorporated in or appurtenant to the 'lay day' or 'demurrage' clauses of the charter parties. See *Wood* v. *Keyser,* D. C., 84 F. 688; *Hawkhurst S.S. Co.* v. *Keyser,* D.C., 84 F. 693; *Actieselskabet Barford* v. *Hilton & Dodge Lumber Co.,* D. C. 125 F. 137; *United States* v. *Coal Cargo of The Henry County,* D. C., 11 F.2d 805; *United States* v. *Russian Volunteer Fleet,* D. C., 22 F.2d 187."

It is, therefore, respectfully submitted that if this Court should hold that Charterer is not entitled to recover freight from Cargo, even though Charterer is under no liability to Cargo, Charterer is entitled to recover such freight from Shipowner.

POINT V

The District Court's award to Charterer of its attorneys' fees and legal costs should be affirmed.

A. Charterer's right to indemnity for legal fees even though Charterer was not liable to Cargo.

Almost immediately after the stranding and loss of the Vessel on May 15, 1969 in the Maldive Islands, suits were instituted against both Shipowner and Charterer by Cargo involving several million dollars. Whatever obligation to Cargo Charterer may have had, and however the disaster may have occurred, as between Shipowner and Charterer (a time and not a demise charterer), Charterer had nothing to do with whatever brought about the loss of the Vessel. However, it was apparent that long and extensive

proceedings would be involved before the rights and obligations of the respective parties were finally determined. Charterer was thus exposed to the risk of a very substantial liability and clearly had no choice but to take all necessary legal steps to protect its interests in this complicated controversy. No one could say years in advance of a final determination whether the cause of the loss would be, for example, failure of Shipowner to exercise due diligence to make the Vessel seaworthy giving rise to liability, or negligent navigation, or some other exemption of COGSA relieving both Shipowner and Charterer of liability.

We submit, therefore, Charterer acted reasonably in taking all necessary action to protect its interest and that in view of the indemnity relationship between Owner and Charterer discussed in POINT II of our brief, Charterer is entitled to its attorneys' fees, even though it was exonerated from any liability, to the same extent it would have had it been held liable to Cargo. Therefore the Court properly allowed Charterer's claim for attorneys' fees.*

The cases make it clear that there is no basis for requiring an indemnitee to bear the expenses of successfully defending a suit brought against it where the indemnitor is admittedly to bear such expenses of an unsuccessful defense of such a suit, since this would place a premium on losing law suits.

It has been repeatedly held in this Court and elsewhere that where there is an indemnity relationship between two

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* We take issue with Shipowner's comment in its footnote on page 3 of its brief to the effect that Charterer did not claim attorneys' fees in the event the cargo claims were defeated. Charterer both in its claim in the limitation proceeding (25a, 25b) and in its answer (35a) to the limitation complaint asserted a claim for attorneys' fees in broad terms. And in Charterer's proposed Findings of Fact and Conclusions of Law submitted several months prior to the trial, the claim for attorneys' fees even in the event Cargo's claim was defeated, was most precisely stated.

parties both of whom are sued by a third party, the indemnitee is entitled to its attorneys' fees where the ultimate liability, if there is any liability, is that of the indemnitor. Although the question of attorneys' fees has arisen most frequently in the longshoreman-stevedore-shipowner triangle, it is settled in this Circuit that the rule is equally applicable to the cargo owner-charterer-shipowner triangle. *Nichimen Company* v. *M. V. Farland,* 462 F.2d 319, 333-334 (2d Cir. 1972). It is equally well settled that attorneys' fees are granted to the potential indemnitee whether his efforts, as here, are successful or unsuccessful. *Massa* v. *C. A. Venezuelan Navigacion,* 332 F.2d 779 (2d Cir. 1964); *Guarracino* v. *Luckenbach S.S. Co.,* 333 F.2d 646 (2d Cir. 1964); *Iligan International Corp.* v. *S.S. John Weyerhaeuser,* 372 F. Supp. 859 (S.D.N.Y. 1974), *Wellington Transportation Company* v. *United States,* 481 F.2d 108 (6th Cir. 1973).

Massa v. *C. A. Venezuelan Navigacion,* 332 F.2d 779 (2d Cir. 1964), involved the customary longshoreman-shipowner-stevedore situation. The shipowner successfully defended the action brought against it by the longshoreman and asserted a claim against the stevedore for its legal fees incurred in connection with the litigation. In allowing shipowner its attorneys' fees incurred in defense of the longshoreman's action, this Court emphasized that the awarding of attorneys' fees was not dependent upon the outcome of the litigation and that it was sufficient that shipowner had been put in a position of foreseeable or potential loss by being rendered likely to suit, stating as follows at page 782:

> "If the stevedore fails to use reasonable care in handling equipment or cargo, resulting in foreseeable or potential loss to the shipowner by rendering it likely to suit, the stevedore has breached its warranty of workmanlike service."

In conclusion this Court held that the District Court had abused its discretion in failing to permit shipowner to recover its attorneys' fees stating at page 782:

> ". . . we see no good reason for forcing the shipowner to bear the expenses of successfully defending the suit when the stevedore would have to bear the shipowner's expenses of unsuccessfully defending the suit. Such a rule would place a premium on losing lawsuits."

Guarracino v. *Luckenbach S.S. Co.*, 333 F.2d 646 (2d Cir. 1964), involved a similar situation where the shipowner successfully defended the suit brought against it. Nevertheless, the court awarded the shipowner its legal fees stating at page 648:

> "The determination that the ship was neither negligent nor unseaworthy does not, however, relieve the stevedore from liability to the shipowner for breach of warranty of workmanlike service. Recovery over may be had even if the shipowner is exonerated from fault or unseaworthiness. Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V. 324 F.2d 746 (5 Cir. 1963) cert. denied 84 S.Ct. 969 (1964); Massa v. C. A. Venezuelan Navigacion, 332 F.2d 779 (2 Cir. 1964). Potential liability is sufficient. Damanti v. A/S Inger, 2 Cir. 1963, 314 F.2d 395, cert. denied Daniels & Kennedy, Inc. v. A/S Inger, 375 U. S. 834, 84 S.Ct. 46, 11 L.Ed. 2d 64 (1963)."

In *Iligan International Corp.* v. *S.S. John Weyerhaeuser*, 372 F. Supp. 859 (S.D.N.Y. 1974), decided in the Southern District in March of this year, the same principle was applied in an shipowner-charterer-cargo situation such as ours. There suit was brought against the charterer and the shipowner for cargo damage in an amount in excess of $2,000,000. Cargo recovered against both charterer and

shipowner but both were held entitled to the benefit of the $500 per package limitation of COGSA, thus presumably materially reducing cargo's recovery. Charterer was held entitled to indemnity from shipowner, and in connection with the award of legal fees the court stated at pages 871-872:

> "It is also clear that the charterer is entitled to the award of fees incurred in defending against the charge of breach of such warranty [unseaworthiness] even if it is ultimately exonerated. *Guarracino* v. *Luckenbach S. S. Co.*, 333 F.2d 646, 648 (2d Cir. 1964)."

The fact that charterer was partially exonerated, i.e., its liability limited to $500.00 per package, in no way precluded it from recovering its attorney fees.

In *Wellington Transportation Co.* v. *United States*, 481 F.2d 108 (6th Cir. 1973), a vessel owner brought suit against the United States seeking indemnity for legal expenses incurred in successfully defending a suit by a Coast Guardsman who was injured while the Coast Guard was providing towing services to the vessel. The District Court disallowed the claim for such expenses and this was reversed by the Court of Appeals. After holding that the vessel owner was entitled to reimbursement from the United States on a theory of tort indemnity, the Court stated at page 111:

> ". . . [W]e further note that under federal maritime law reasonable attorney fees and litigation expenses are consistently awarded to an indemnitee where those fees and expenses are incurred in defending against the principal action under which the indemnitor is ultimately adjudged to be liable. *See* A. C. Israel Commodity Co. v. American-West African Line, Inc., 397 F.2d 170, 172-173 (3d Cir.), cert. denied, 393 U.S. 978, 89 S.Ct. 446, 21 L.Ed.2d 439 (1968). Although in most of the relevant cases the indemnitee's defense against the principal action has been unsuc-

> cessful and attorney fees and expenses are thus awarded as incident to damages incurred by the indemnitee, there is no sound reason why such fees and expenses incurred in an indemnitee's successful defense of the principal action should not alone be indemnifiable. Indeed, a rule allowing indemnification for attorney fees and expenses incurred by an indemnitee in unsuccessfully defending against the principal action, yet denying the same for a successful defense would place a 'premium on losing lawsuits.' Massa v. C. A. Venezuelan Navigacion, 332 F.2d 779 (2 Cir. 1964)."

See also *Damanti* v. *A/S Inger,* 314 F.2d 395 (2d Cir. 1963), *cert. denied, Daniels & Kennedy, Inc.* v. *A/S Inger,* 375 U.S. 834 (1963); *Ellerman Lines, Ltd.* v. *Atlantic & Gulf Stevedores, Inc.,* 339 F.2d 673, 674 (3d Cir. 1964), *cert. denied,* 382 U.S. 812 (1965); *Bielawski* v. *American Export Lines,* 220 F. Supp. 265 (E.D. Va. 1963), aff'd, 336 F.2d 525 (4th Cir. 1964); *Reed* v. *Bank Lines, Ltd.,* 285 F. Supp. 808 (E.D. La. 1966); *Hirstius* v. *Hess Terminal Corp.,* 286 F. Supp. 566 (E.D. La. 1966).

The significance of these cases is that it is not liability incurred by an indemnitee which gives rise to the right to attorneys' fees but rather the exposure to possible liability as a result of some act of the indemnitor—here the stranding of Shipowner's vessel. Counsel for Shipowner virtually admits this when they state at page 10 of their brief: "The element of liability, or at the very least probable liability, to another party in the first instance is essential to a right of indemnity." As we have stated above, who is to say four years before the trial whether the Vessel's stranding was caused by unseaworthiness or negligent navigation or whether liability was or was not "probable"?

It would be illogical to hold Charterer entitled to collect its legal fees from Shipowner had Cargo recovered but not when Cargo's claim was dismissed. As the above cases

have well stated, to award attorneys fees only when the indemnitee fails to successfully defend the action brought against him would put a premium on losing.

B. The so-called "errors of navigation" exception of the Charter.

Counsel for Shipowner contends that Clause 16 of the Charter protects Shipowner from any claims by Charterer for its legal expenses where, as here, the Court finds that the cause of the disaster was negligent navigation.

In Point IV of our brief we set forth in some detail the relation between Clause 16, on which Shipowner relies, and Clause 26 pursuant to which the Shipowner is made responsible for the navigation of the Vessel. We submit, for the reasons stated in Point IV, that Clause 16 is no defense to Shipowner to Charterer's right to indemnity for its legal fees.

In Point IV we urged that if the Charterer were held not entitled to recover freight from Cargo even though Charterer was exonerated from liability to Cargo, in such event Charterer would be entitled to recover such freight from Shipowner and nothing in Clause 16 would prevent this. The same argument which we there advanced in support of Charterer's freight claim against Shipowner, and to which we again refer this Court, applies equally to Charterer's claim for attorneys' fees.

In short, for the reasons previously stated, we submit there is no general exculpatory provision relieving Shipowner of liability to Charterer in cases of negligence on the part of Shipowner's employees. On the contrary, precisely the reverse is the case since Shipowner has by Clause 26 assumed full responsibility for the navigation of the Vessel. Thus, it is no defense to Charterer's claim for legal fees that the disaster giving rise to the litigation which necessitated the incurring of legal fees was brought about by the negligent navigation of Shipowner's employee.

C. The suggestion for a division of Charterer's attorneys' fees.

It is correct, as pointed out in Shipowner's brief, that Charterer's position is a threefold one. First, defending the action brought against it by Cargo; second, the assertion of its claim for unpaid freight against Cargo and finally its claim for indemnity from Shipowner. Shipowner, while denying Charterer's claim for any attorneys' fees, appears to suggest that in any event such claim should be limited to those fees incurred in defense of Cargo's claim against it.

In actuality, these aspects of Charterer's position merge into one, namely, an attempt, which ultimately proved successful, to establish that the cause of the disaster was negligent navigation. Once this is established, Cargo's claim fails and Charterer's claim against Cargo for freight money, we submit, succeeds; likewise the necessity of an indemnity claim, except for attorneys' fees themselves, against Shipowner becomes unnecessary. In any event, the possibility of a breakdown in Charterer's attorneys' fees was considered by the District Court and rejected (110a). As we point out below, the awarding of attorneys' fees in an Admiralty action is within the discretion of the District Court Judge and, we submit, should not be disturbed in this case.

D. The discretion of the District Court to award attorneys' fees.

Finally, we submit that the awarding by the District Court of attorneys' fees was properly within the Court's discretion. It is well recognized that Federal courts, including Federal courts sitting in Admiralty, are empowered as part of their equity jurisdiction and in their discretion to award counsel fees. For example, in *Vaughan* v. *Atkinson,* 369 U.S. 527 (1962), a seaman's suit in Admiralty, the Court stated at page 530:

> "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief. . . .

> ". . . As we stated in Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 164, . . . allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.' . . ."

Once the District Court has awarded attorneys' fees, such award should be respected unless abuse is clearly shown. That "clear abuse of discretion" is the appropriate standard for review in the present case is indicated by this Court's opinion in *Massa* v. *C. A. Venezuelan Navigacion,* 332 F.2d 779 (2d Cir. 1964). We submit there was no such abuse of discretion on the part of the District Court and, therefore, the District Court's award of attorneys' fees should be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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Dated: July 29, 1974.